EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR PORTNOFF, **Plaintiff,** v. **JANSSEN PHARMACEUTICALS, INC.; JANSSEN RESEARCH & DEVELOPMENT, LLC; JOHNSON & JOHNSON CO.; and MITSUBISHI TANABE PHARMA CORP.,** **Defendants.**	**Case No. 16-cv-05955-MSG**

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

I. INTRODUCTION.

Defendant Janssen Pharmaceuticals, Inc. ("Janssen") properly and timely removed the 106 actions identified in its Notice of Removal as a mass action pursuant to the Class Action Fairness Act ("CAFA"). *See* 28 U.S.C. § 1332(d)(11). Plaintiffs' arguments in support of remand have no merit. Accordingly, the Court should deny their motion to remand.[1]

First, Plaintiffs argue that there is no proposal to jointly try the claims of more than 100 plaintiffs. But the October 11, 2016 Petition to Consolidate and for Mass Tort Designation ("October 11 Petition" or "Petition") *explicitly* proposed a joint trial—a fact that Plaintiffs themselves acknowledge. Moreover, Plaintiffs cannot defeat CAFA jurisdiction by relying on the post-removal "Supplement" to the October 11 Petition, in which they purport to retract that proposal. It is well-settled that jurisdiction is assessed *at the time of removal* and that when an action is properly removed, post-removal amendments designed to defeat jurisdiction do *not*

[1] Although the instant motion to remand was filed by Mr. Portnoff, other plaintiffs have joined in it. Accordingly, Defendants refer to "Plaintiffs" as opposed to "Plaintiff" throughout this Opposition.

provide a basis for remand. Plaintiffs cannot circumvent this well-settled rule by mischaracterizing their proposal for a joint trial as a "scrivener's error." Nor can they defeat jurisdiction by arguing that Janssen's Notice of Removal did not become "effective" until after Plaintiffs "corrected" that error. As explained below, these arguments are factually and legally baseless.

Second, Plaintiffs argue that Janssen's Notice of Removal was untimely because the removal clock started ticking on September 23, 2016 with the filing of the initial petition for consolidation (the "September 23 Petition"). This argument is a non-starter too. The September 23 Petition was submitted by six law firms that collectively represented fewer than 100 plaintiffs. While that petition also identified additional cases filed by *other* plaintiffs represented by *other* counsel, Janssen had no legal basis for concluding that those other plaintiffs would acquiesce in the request for a joint trial until the 20-day deadline for opposing the petition expired. Before that occurred, however, Plaintiffs withdrew the September 23 Petition at the state court's direction and filed the operative October 11 Petition, thus mooting any removal that could have been filed based on the September 23 Petition. When it became clear that no plaintiff opposed the request for a joint trial contained in the October 11 Petition, Janssen timely removed the 106 actions at issue to this Court. Accordingly, Plaintiffs' untimeliness argument fails.

II. PLAINTIFFS EXPLICITLY PROPOSED A JOINT TRIAL OF THE CLAIMS OF MORE THAN 100 PLAINTIFFS.

CAFA "creates federal jurisdiction over class litigation—including 'mass actions' in which plaintiffs propose a trial involving the claims of 100 or more litigants—if at least one plaintiff demands $75,000, the stakes of the action as a whole exceed $5 million, and minimal diversity of citizenship exists." *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 761

(7th Cir. 2008).[2] A joint trial for purposes of CAFA's mass action provisions can take different forms so long as it is proposed that some part of plaintiffs' claims be "determined jointly." *In re Abbott Labs., Inc.*, 698 F.3d 568, 573 (7th Cir. 2012); *see also* 151 Cong. Rec. H723, H729 (daily ed. Feb. 17, 2005) (noting that plaintiffs propose a joint trial whenever they request that claims can be determined jointly "in any respect") (statement of Rep. Sensenbrenner).

Here, there is no question that the October 11 Petition explicitly proposed a joint trial of the claims of more than 100 plaintiffs. *See* Def.'s Not. of Removal, Ex. C (October 11 Petition) at 6 ("[C]onsolidation for pre-trial ***and trial*** will promote judicial economy and the just and efficient resolution of these actions." (emphasis added)). Even *Plaintiffs* acknowledge as much. *See* Pls.' Mem. at 7 (acknowledging that "[j]oint trial proceedings are . . . discussed . . . in the conclusion section of the Petition"). Nor is there any dispute that an explicit proposal for a joint trial triggers CAFA jurisdiction. In fact, courts have found CAFA jurisdiction even in the *absence* of an explicit proposal. *See, e.g.*, *In re Abbott Labs., Inc.*, 698 F.3d at 572–73 ("Plaintiffs argue that they never specifically asked for a joint trial, but a proposal for a joint trial can be implicit. . . . Plaintiffs may not have explicitly asked that their claims be tried jointly, but the language in their motion comes very close."); *Corber v. Xanodyne Pharms., Inc.*, 771 F.3d 1218, 1223–24 (9th Cir. 2014) (rejecting argument that plaintiffs "must expressly request a 'joint trial' in order to be a proposal to try the cases jointly[,]" and holding that plaintiffs triggered CAFA jurisdiction when they requested coordination "for all purposes"). Because an implicit proposal for a joint trial can support CAFA jurisdiction, an *explicit* proposal such as the one at issue here necessarily does so. Plaintiffs have cited no contrary authority.

A. Plaintiffs' Post-Removal Retraction Of Their Joint Trial Proposal Is A Legal

[2] Plaintiffs do not dispute that the amount-in-controversy requirements for a mass action have been met here. *Compare* Def.'s Not. of Removal ¶¶ 16–26, *with generally* Pls.' Mem.

Nullity And Provides No Basis For Remand.

On November 15, 2016—*i.e.*, *after* learning that Janssen removed these cases as a mass action on November 9, 2016—Plaintiffs filed a "Supplement" to their October 11 Petition in Pennsylvania state court. In that Supplement, Plaintiffs reversed their joint trial proposal, purporting to "change" the concluding sentence of their October 11 Petition and stating that they "are not requesting a joint and/or consolidated trial." Pls.' Mem., Ex. A at 1–2 (emphasis in original). But Plaintiffs' post-removal retraction of their joint trial proposal does *not* defeat this Court's CAFA jurisdiction.

It is well-settled in the Third Circuit that federal jurisdiction is determined *at the time of removal*. *See, e.g.*, *Westmoreland Hosp. Ass'n v. Blue Cross of W. Pa.*, 605 F.2d 119, 123 (3d Cir. 1979) (explaining that "the nature of the plaintiffs' claim must be evaluated, and the propriety of remand decided, on the basis of the record as it stands [a]t the time the petition for removal is filed," and explaining further that "[a] subsequent amendment to the complaint after removal designed to eliminate the federal claim will not defeat federal jurisdiction" (citing *Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939))), *cert. denied*, 444 U.S. 1077 (1980); *Albright v. R.J. Reynolds Tobacco Co.*, 531 F.2d 132, 135 (3rd Cir. 1976) ("It is settled that '[g]enerally the right of removal is decided by the pleadings, viewed as of the time when the petition for removal is filed,' . . . and that 'events occurring subsequent to removal . . ., whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached.'" (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 293 (1938))).

This rule makes good sense because it protects a defendant's statutory right of removal by guarding against the risk that plaintiffs will attempt to manipulate their way back to state court by pleading away federal jurisdiction. *See, e.g.*, *Red Cab Co.*, 303 U.S. at 294 (reasoning that defendant's statutory right of removal should not be "subject to the plaintiff's caprice"); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 474 n.6 (2007) (explaining that "removal cases raise forum-manipulation concerns" and acknowledging that when a defendant removes a case to federal court, "an amendment eliminating the original basis for federal jurisdiction generally does not defeat jurisdiction"); *Wright Transp., Inc. v. Pilot Corp.*, 841 F.3d 1266, 1272 (11th Cir. 2016) (confirming in CAFA case that forum-manipulation concerns "dictate that we guard against a plaintiff whose case has been removed to federal court and who then amends its pleadings in an attempt to manipulate its way back into state court"); *In Touch Concepts, Inc. v. Cellco P'ship*, 788 F.3d 98, 101–02 (2d Cir. 2015) (recognizing risk of forum manipulation and holding that post-removal amendment dropping class-action allegations did not defeat CAFA jurisdiction); *Cedar Lodge Plantation, L.L.C. v. CSHV Fairway View I, L.L.C.*, 768 F.3d 425, 427 (5th Cir. 2014) (confirming that "[i]t is well-established that the time-of-removal rule prevents post-removal actions from destroying jurisdiction that attached in a federal court under CAFA," acknowledging "the potential for forum manipulation," and holding that post-removal amendment adding local defendant did not defeat CAFA jurisdiction); *In re Burlington N. Santa Fe Ry. Co.*, 606 F.3d 379, 381 (7th Cir. 2010) (holding that post-removal amendment to omit class allegations did not defeat CAFA jurisdiction, and reasoning that "allowing plaintiffs to amend away CAFA jurisdiction after removal would present a significant risk of forum manipulation").

The Eastern District of Pennsylvania consistently has adhered to the time-of-removal rule in both CAFA and non-CAFA cases, holding that plaintiffs *cannot* defeat federal jurisdiction by relying on post-removal amendments and developments where jurisdiction existed at the time of removal. *See, e.g.*, *Cottingham v. Tutor Perini Bldg. Corp.*, Civ. No. 14-2793, 2015 WL

6123214, at *4 (E.D. Pa. Oct. 19, 2015) (holding that post-removal amendment adding forum defendant did not support remand because diversity jurisdiction existed at time of removal); *Berry v. Suzuki of Plymouth Meeting*, Civ. Nos. 11-403, 11-1038, 2011 WL 2670083, at *2 (E.D. Pa. July 7, 2011) (holding that post-removal amendment dismissing federal claim did not divest court of subject matter jurisdiction); *Martin v. Del. Title Loans, Inc.*, Civ. No. 08-3322, 2008 WL 4443021, at *1–*2 (E.D. Pa. Oct. 1, 2008) (holding post-removal amendment dismissing requests for declaratory and injunctive relief did not defeat diversity jurisdiction); *Allen-Wright v. Allstate Ins. Co.*, Civ. No. 07-cv-04087, 2009 WL 1285522, at *3 (E.D. Pa. May 5, 2009) (holding that post-removal denial of class certification did not support remand because CAFA jurisdiction existed at time of removal); *Anthony v. Small Tube Mfg. Corp.*, 535 F. Supp. 2d 506, 512 (E.D. Pa. 2007) ("Case developments subsequent to removal do not generally alter jurisdiction under CAFA."); *Robinson v. Holiday Universal, Inc.*, No. Civ.A. 05-5726, 2006 WL 470592, at *3 (E.D. Pa. Feb. 23, 2006) (explaining that defendant properly removed action because "all of the jurisdictional requirements of CAFA were then met," and holding that "Plaintiffs cannot now 'unring the bell' by dismissing the removing defendant . . . in an attempt to return the lawsuit" to state court); *Schwartz v. Comcast Corp.*, No. Civ.A. 05-2340, 2005 WL 1799414, at *3 (E.D. Pa. July 28, 2008) (holding that post-removal amendment to narrow class allegations could not defeat CAFA jurisdiction); *Matthews v. Key Bank U.S.A. Nat'l Ass'n*, No. Civ.A. 99–1799, 1999 WL 398716, at *2 (E.D. Pa. June 17, 1999) ("Plaintiffs apparently believed that dropping the federal claim which gave rise to removal jurisdiction stripped the federal court of subject matter jurisdiction. It does not.").

Here, CAFA jurisdiction unquestionably existed at the time of removal because the October 11 Petition explicitly proposed a joint trial of the claims of more than 100 plaintiffs.

That being so, Plaintiffs' post-removal retraction of their joint trial proposal is a legal nullity and does not defeat this Court's CAFA jurisdiction. Moreover, as explained below, Plaintiffs cannot unring the bell by arguing that their proposal for a joint trial was a "scrivener's error," nor can they defeat jurisdiction by arguing that Janssen's Notice of Removal did not become "effective" until after Plaintiffs "corrected" that error. Pls.' Mem. at 6–9. These arguments have no factual or legal merit.

B. Plaintiffs Cannot Defeat CAFA Jurisdiction By Arguing That They Made A "Scrivener's Error."

Plaintiffs' proposal for a joint trial was deliberate and explicit. Plaintiffs may not have understood at the time that their proposal would trigger Janssen's federal right of removal under CAFA. But it did. And now that they are in federal court, Plaintiffs cannot make a course-correction.

Plaintiffs rely on *Schillinger v. Union Pacific Railroad Co.*, 425 F.3d 330 (7th Cir. 2005), and *Erie Insurance Exchange v. Erie Indemnity Co.*, No. 2:12-cv-1205, 2012 WL 4762203 (W.D. Pa. Oct. 5, 2012). *See* Pls.' Mem. at 8–9. But these cases are easily distinguishable and do not support Plaintiffs' argument.

In *Schillinger*, the Seventh Circuit affirmed the district court's ruling that the plaintiffs' addition of a defendant in their amended state-court complaint constituted a "scrivener's error" that did not trigger CAFA jurisdiction. 425 F.3d at 333–34. In so ruling, the court explained that the plaintiffs had voluntarily dismissed the defendant from their initial state-court complaint; they did not discuss the addition of the defendant in their motion to amend or supporting memorandum; they did not serve the defendant with a copy of the motion to amend or amended complaint; and their counsel filed an affidavit in which he explained that his staff used the original complaint "as a word processing template" in drafting the amended complaint and "failed to notice that this resulted in the incorporation of the old caption and introductory allegations into the amended complaint." *Id.* at 332–33. The court then stated in dicta that because "an amendment that is made for *legitimate purposes* may be a proper ground for remand[,] . . . the district court would properly have granted a motion to remand if plaintiffs had amended their complaint to correct the mistake." *Id.* at 333 (emphasis added). Significantly, the court qualified its dictum by confirming what the Third Circuit has long recognized—to wit, that if a plaintiff "amend[s] simply to destroy diversity, *the district court should not remand*." *Id.* (emphasis added).

In *Erie Insurance Exchange*, the defendant removed the plaintiffs' action on the grounds that it was a class action within the meaning of CAFA. *See* 2012 WL 4762203, at *2. The defendant's theory was that the action must be a class action given that plaintiffs purported to file the complaint as individual trustees ad litem on behalf of all members of the Erie Insurance Exchange. *See id.* Following removal, the plaintiffs filed an amended complaint to clarify that the lawsuit was filed on behalf of the Erie Insurance Exchange itself, not for an individual member's recovery, and they then moved to remand for lack of CAFA jurisdiction. *See id.* at *3. Relying on *Schillinger*, the court found that remand was appropriate because (1) the initial complaint did not include "the designation 'Class Action' . . . [or] a separate heading styled 'Class Action Allegations,'" (2) the initial complaint "never alleged class claims," and (3) the amended complaint merely "clarified" the nature of the plaintiffs' initial claims without changing their substance. *Id.* at *2–*4. In so finding, however, the court repeated *Schillinger*'s admonition that a court "should not remand" where a plaintiff amends "simply to destroy diversity." *Id.* at *3.

This case is nothing like *Schillinger* and *Erie Insurance Exchange*. Those cases involved obvious clerical mistakes in the plaintiffs' pleadings that were facially inconsistent with the plaintiffs' initial complaint (*Schillinger*) or the substance of their claims (*Erie Insurance Exchange*). Here, by contrast, Plaintiffs explicitly proposed a joint trial in the October 11 Petition and then, following removal, sought to re-write their Petition by retracting that proposal.

Plaintiffs cannot credibly argue that they made a mistake like the plaintiffs in *Schillinger* and *Erie Insurance Exchange* when they voluntarily proposed a joint trial. Indeed, Plaintiffs' after-the-fact argument is belied by other statements in the October 11 Petition. Plaintiffs repeatedly asserted that consolidation was necessary to promote the efficient *resolution* of their claims. *See* October 11 Petition at 5 (arguing in heading to Section 3 that "the creation of a mass tort program will . . . promote efficient resolution of related claims"); *id.* (arguing in Section 3 that consolidation will "promote the efficient prosecution and resolution of these Related Actions"); *id.* at 6 (arguing in Section 4 that "consolidation for pre-trial and trial will promote judicial economy and the just and efficient resolution of these actions"). These repeated assertions reaffirm what the language of their Petition explicitly provides—*i.e.*, Plaintiffs proposed a joint trial. *See Corber*, 771 F.3d at 1223–24 ("[T]he specific reasons given for coordination also support the conclusion that a joint trial was requested. For example, Plaintiffs listed potential issues in support of their petitions that would be addressed only through some form of joint trial, such as the danger of inconsistent judgments and conflicting determinations of liability.").[3]

[3] Contrary to Plaintiffs' suggestion, it makes no difference that "there has never been a joint trial of a hundred or more plaintiffs in a pharmaceutical case" in the Philadelphia Court of Common Pleas Mass Tort Program or that a joint trial "would be impractical." Pls.' Mem. at 6–7 n.2. As the Ninth Circuit confirmed in *Corber*, the relevant issue "under the plain language of CAFA . . . [is] whether Plaintiffs *proposed* a joint trial, not whether one will occur." 771 F.3d at 1224 n.5 (emphasis in original). Further, contrary to Plaintiffs' suggestion, a joint trial for purposes of CAFA does *not* require that all plaintiffs be in court at the same time. *See Bullard*, 535 F.3d at

Moreover, Plaintiffs' only purpose in retracting their proposal for a joint trial was to defeat this Court's CAFA jurisdiction and send this mass action back to state court. In fact, it was not until this Court contacted Plaintiffs' counsel regarding the removed cases on November 15, 2016 that Plaintiffs filed the Supplement to their Petition in which they retracted the proposal for a joint trial.[4] As explained in *Schillinger* and *Erie Insurance Exchange*, this Court "should not remand" under these circumstances because Plaintiffs are not seeking to correct a clerical mistake for legitimate purposes. *Schillinger*, 425 F.3d at 333; *Erie Ins. Exch.*, 2012 WL 4762203, at *3; *see also Sanchez v. The Ritz Carlton*, Case No. CV 15-3484, 2015 WL 4919972, at *2 (C.D. Cal. Aug. 17, 2015) (denying motion to remand and finding that plaintiffs' post-removal amendment, which had the effect of reducing the class size below CAFA threshold of 100 plaintiffs, was intended not to "clarify[] jurisdiction details" but rather "to amend away jurisdiction"); *Casias v. Distribution Mgmt. Corp.*, No. 1:11–CV–00874, 2012 WL 4511364, at *4 (D.N.M. Sept. 26, 2012) (finding that plaintiffs' post-removal request to amend class allegations was intended to destroy federal jurisdiction, and explaining that if plaintiffs "had wanted to avoid federal jurisdiction under CAFA, [they] should have taken care in their original

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762 ("The question is not whether 100 or more plaintiffs answer a roll call in court, but whether the 'claims' advanced by 100 or more persons are proposed to be tried jointly. A trial of 10 exemplary plaintiffs, followed by application of issue or claim preclusion to 134 more plaintiffs without another trial, is one in which the claims of 100 or more persons are being tried jointly, and § 1332(d) thus brings the suit within federal jurisdiction."); *Atwell v. Boston Scientific Corp.*, 740 F.3d 1160, 1163 (8th Cir. 2013) (following *Bullard* and explaining that "in determining whether plaintiffs have 'proposed' that their claims be tried jointly, 'the proposal can be implicit . . . [and t]he joint trial could be limited to one plaintiff (or a few plaintiffs)" (citing *Koral v. Boeing Co.*, 628 F.3d 945, 947 (7th Cir. 2011)); *see also Cooper v. R.J. Reynolds Tobacco*, 586 F. Supp. 2d 1312, 1321 (M.D. Fla. 2008) ("[I]t is the request for a joint trial, and not whether the joint trial occurs, that triggers federal jurisdiction.").

[4] Plaintiffs filed their Supplement at 3:41 p.m. on November 15, 2016. *See* Pls.' Mem., Ex. A at 1. That same day, Rosemary Pinto of Feldman & Pinto emailed counsel for Janssen and counsel for Plaintiffs advising of the telephone call with this Court's Chambers. *See* Ex. A, Nov. 15, 2016 E-mail from Rosemary Pinto to Gregory Sturges and Brian Feeney.

complaint to restrict the scope of the allegations defining potential class members").

Based on the foregoing, Plaintiffs can derive no support from *Schillinger* and *Erie Insurance Exchange*. Instead, this case is like *Altoum v. Airbus S.A.S.*, No. 10–CV–467, 2010 WL 3700819 (N.D. Ill. Sept. 9, 2010). In *Altoum*, the plaintiffs moved to remand an action removed on CAFA mass action grounds on the theory that their counsel's inclusion of 22 plaintiffs in the complaint was a scrivener's error. *Id.* at *2–*3. In denying the plaintiffs' motion, the court explained that a scrivener's error refers to such "minor mistake[s]" as "typing an incorrect number" or "mistranscribing a word." *Id.* at *3. The court found that because the plaintiffs' counsel "was not transcribing or copying any document" when he drafted the complaint, his inclusion of the 22 plaintiffs was not a scrivener's error and did not support remand. *See id.* at *3–*4. Further, the court explained that because plaintiffs' counsel "knowingly chose to bring suit on behalf of more than 100 plaintiffs," his inclusion of the 22 plaintiffs at issue "cannot be considered 'inadvertent.'" *Id.* at *4.

As in *Altoum*, Plaintiffs' proposal for a joint trial was no scrivener's error. Indeed, Plaintiffs did not mistranscribe a word or commit a typographical error. Instead, they are simply trying to reverse course now that they realize that their joint trial proposal gave rise to federal jurisdiction under CAFA. Plaintiffs are "the masters of their petition[] for coordination." *Corber*, 771 F.3d at 1223; *see also Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009) ("The enactment of CAFA did not alter the proposition that the plaintiff is the master of the complaint."). Plaintiffs deliberately and explicitly proposed that the claims of more than 100 plaintiffs be tried jointly. Both Janssen and this Court are entitled to assume that Plaintiffs meant what they said. *See Corber*, 771 F.3d at 1223 ("[W]hen we assess whether there has been a proposal for joint trial, we hold plaintiffs responsible for what they have said and done."). The

Eastern District of Pennsylvania has reaffirmed this basic proposition in a case involving analogous circumstances. *See Martin*, 2008 WL 4443021, at *1–*2 (rejecting plaintiff's argument that post-removal amendment to eliminate "loosely worded" requests for declaratory and injunctive relief was intended to clarify "the nature of the action" rather than defeat federal jurisdiction, and reasoning that plaintiff "gratuitously volunteered these words on the face of the Original Complaint" and whether he "later determined that these words were improvident or mere surplusage is not the test" (citing *Westmoreland Hosp. Ass'n*, 605 F.2d at 123)). This Court should do the same.

Indeed, holding Plaintiffs accountable for proposing a joint trial is the right thing to do because a contrary outcome would encourage the very forum manipulation that the time-of-removal rule is intended to prevent. *See supra* at 4–5. Defendants had *a statutory right* to remove Plaintiffs' actions to federal court based on CAFA's mass action provision. *See* 28 U.S.C. §§ 1332(d)(11), 1441(a). Accepting Plaintiffs' attempt to rewind the clock would mean that Defendants' statutory right of removal is "subject to the plaintiff's caprice" and therefore illusory. *Red Cab Co.*, 303 U.S. at 294. That is unacceptable.[5]

C. Federal Jurisdiction Attached When Janssen Filed Its Notice Of Removal In

[5] Moreover, Plaintiffs' attempted course correction is just the latest example of their improper forum manipulation tactics. Virtually *all* of the 106 actions removed to federal court—*i.e.*, 103 of 106, or 97%—involve plaintiffs who reside in states *other* than Pennsylvania. *See* Def.'s Not. of Removal, Ex. A (Chart of Removed Actions). Those out-of-state plaintiffs were not prescribed Invokana in Pennsylvania; they did not use Invokana in Pennsylvania; they were not injured in Pennsylvania; they did not seek medical treatment in Pennsylvania; and none of the defendants named in their complaints is even headquartered in Pennsylvania. Their claims simply have *no* connection to Pennsylvania and never should have been filed here in the first instance. *See, e.g.*, *Engstrom v. Bayer Corp.*, 855 A.2d 52, 55–56 & n.4 (Pa. Super. 2004) (affirming trial court's dismissal on forum-non-conveniens grounds where plaintiffs were citizens of Missouri, Washington, Arizona, and Hawaii and defendant was headquartered in Pittsburgh, and confirming "'the interest of the Commonwealth in providing a forum for its residents to litigate is not implicated'" (quoting *Cinousis v. Hechinger Dep't Store*, 594 A.2d 731, 733 (Pa. Super. 1991))).

Federal Court.

In addition, Plaintiffs cannot defeat CAFA jurisdiction by arguing that they retracted their proposal for a joint trial *before* Janssen's Notice of Removal became "effective." Pls.' Mem. at 9. According to Plaintiffs' theory, removal did not become "effective" until Janssen filed notice of it in Pennsylvania state court on November 17, 2016—*i.e.*, two days after Plaintiffs filed the "Supplement" to the October 11 Petition. *See* Pls.' Mem. at 8–9. Plaintiffs' proposed theory has *no* legal support.

The Eastern District of Pennsylvania has confirmed that "[f]ederal jurisdiction attaches when the defendant files the petition for removal in the district court." *Boyce v. St. Paul Fire & Marine Ins. Co.*, Civ. No. 92–6525, 1993 WL 21210, at *3 (E.D. Pa. Jan. 28, 1993) (citing 1A Moore's Federal Practice ¶ 0.1683[3.-8-3].); *see also Allen-Wright*, 2009 WL 1285522, at *3 ("Jurisdiction attached to this case at its time of removal . . . ."). While 28 U.S.C. § 1446(d) requires that a notice of removal also be filed in state court, that provision has no bearing on when removal becomes "effective." Instead, the provision is intended merely to notify the state court that its own jurisdiction is terminated. *See, e.g.*, *Resolution Trust Corp. v. Nernberg*, 3 F.3d 62, 69 (3d Cir. 1993) (explaining that filing notice of removal in state court is "necessary to terminate the state court's jurisdiction"); *Tube City IMS Corp. v. Allianz Global Risks U.S. Ins. Co.*, No. 2:14cv1245, 2014 WL 6682577, at *3 (W.D. Pa. Nov. 25, 2014) (explaining that "'federal jurisdiction commences when the defendant files the notice of removal with the district court, and filing the notice with the state clerk affects the state's jurisdiction rather than federal jurisdiction'" (quoting *Parker v. Malone*, Nos. Civ.A. 7:03CV00742, Civ.A. 7:03CV00743, Civ.A. 7:03CV00744, 2004 WL 190430, at *2 (W.D. Va. Jan. 15, 2004))); *Boyce*, 1993 WL 21210, at *3 ("Failure to file a copy of the petition with the state court does not defeat jurisdiction."). Accordingly, this Court's jurisdiction attached and was "effective" on November 9—*i.e.*, *before* Plaintiffs retracted their proposal for a joint trial.

III. JANSSEN'S NOTICE OF REMOVAL WAS TIMELY.

Under 28 U.S.C. §§ 1446(b)(3) and 1453(b), Janssen had 30 days to remove after receiving "a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." Courts have consistently held that the 30-day removal clock is "triggered only when the *plaintiffs*' complaint or *plaintiffs*' subsequent paper provides the defendant with sufficient information to easily determine that the matter is removable." *Romulus v. CVS Pharmacy, Inc.*, 770 F.3d 67, 72 (1st Cir. 2014) (emphasis in original). Plaintiffs argue that Janssen's Notice of Removal—filed on November 9, 2016—was untimely because the 30-day removal clock started ticking on September 23, 2016 with the attempted filing of the September 23 Petition. As explained below, Plaintiffs' argument has no factual or legal merit. Instead, the removal clock did not start ticking until after Plaintiffs filed the October 11 Petition and after it could be ascertained that the matters were removable. Accordingly, Janssen filed its Notice of Removal well within the statutorily-prescribed period.

The September 23 Petition did not provide sufficient information for Janssen to ascertain that the cases were removable. The September 23 Petition was submitted by the following six law firms: (1) Feldman & Pinto; (2) Levin Fishbein, Sedran & Berman; (3) NastLaw, LLC; (4) Lopez McHugh; (5) Weitz & Luxenberg; and (6) Morgan & Morgan. *See* Ex. B, September 23 Petition at 1, 6. The petition states that "[t]here are approximately 87 cases pending in this Court as set forth on Exhibit 1." *Id.* at 1. Of the 87 cases identified in Exhibit 1 to that petition, two cases (*Suddreth* and *Moyers*) had been dismissed and one (*Harold*) appears to be an error because no such case exists. The remaining 84 cases involved 114 plaintiffs, although Exhibit 1 only lists 84 plaintiffs. *See* Ex. C, Chart of Cases Identified in September 23 Petition (the

"September 23 Petition Chart").

While the September 23 Petition proposed a joint trial of all plaintiffs' claims (*see* Ex. B, September 23 Petition at 6), the filing of that petition did *not* trigger Janssen's 30-day deadline to remove the actions. Significantly, the six law firms that submitted the September 23 Petition did *not* represent all 114 plaintiffs in the 84 cases identified in the petition. As the attached September 23 Petition Chart demonstrates, those firms represented only 89 plaintiffs in 60 cases—*i.e.*, fewer than the 100-plaintiff threshold required to trigger CAFA's mass action provision. *See* September 23 Petition Chart at 29 ("Breakdown" Table). The remaining 25 plaintiffs were represented by *other* firms. *See id.*

The law firms that submitted the September 23 Petition had no authority to bind the 25 plaintiffs who they did not represent. Indeed, that basic proposition is not even debatable, as it has been enshrined in the law of Pennsylvania for well over 100 years. *See, e.g.*, *Commw. v. Kreager*, 78 Pa. 477, 479 (1875) (confirming that attorney was authorized to bind only his own client); *see also State v. Conner*, No. 2 CA–CR 2015–0024, 2015 WL 1880943, at *2 (Ariz. Ct. App. Apr. 22, 2015) ("We think it plain that an attorney cannot act on behalf of someone he or she does not represent."). Accordingly, those 25 remaining plaintiffs had 20 days under Pennsylvania law—*i.e.*, until October 13, 2016—to respond to the petition's proposal for a joint trial. *See* Phila. Civ. R. *208.3(b)(2)(B). Until that 20-day deadline for responding to the petition expired, Janssen had no basis for concluding that those other plaintiffs would acquiesce in the proposal for a joint trial. Plaintiffs themselves appear to recognize as much. *See* Pls.' Mem. at 6 (arguing that one plaintiff's conduct "does not mean" that another plaintiff "proposed or acquiesced to a joint trial with 100 or more persons").

On October 11, 2016—*i.e.*, two days *before* the 20-day deadline for opposing the September 23 Petition expired—Plaintiffs withdrew that petition and subsequently filed the October 11 Petition. *See* Pls.' Mem., Ex. G (Affidavit of Mary Porter ("Porter Aff.")).[6] This sequence of events is significant for several reasons.

As an initial matter, the withdrawal of the September 23 petition prevented Janssen from knowing whether the remaining 25 plaintiffs would acquiesce in or oppose the proposal for a joint trial contained in the petition. More significantly, the withdrawal of the September 23 Petition mooted the issue and removed any basis for removal. When Plaintiffs withdrew the September 23 Petition, there was no longer a proposal for a joint trial that could support removal. *See, e.g.*, *United States v. Two Bank Accounts*, Civ. Nos. 06–4016–KES, 06–4005, 2009 WL 203748, at *2 & n.1 (D.S.D. Jan. 27, 2009) (rejecting claimant's argument that court deprived him of opportunity to respond to government's forfeiture motions and reasoning that "these motions had no effect on [him] because . . . [they] were withdrawn"); *In re: Wade I. Treadway*, Nos. 88–00003, 88–0034, 1989 WL 164735, at *5 (D. Vt. Oct. 19, 1989) ("We consider United Bank's withdrawn motion a nullity.").

The withdrawal of the September 23 Petition and subsequent filing of the October 11 Petition also meant that a new 20-day deadline to respond to the October 11 Petition began running. *See* Phila. Civ. R. *208.3(b)(2)(B). The October 11 Petition was submitted by the same six law firms that submitted the initial petition. *See* Def.'s Not. of Removal ¶ 4 & n.3. Of the 91 cases identified in Exhibit 1 to the October 11 Petition (*see id.* ¶ 5), only 67 cases were filed by those firms. *See* Ex. D, Chart of Cases Identified in October 11 Petition. Those 67 cases involved 96 plaintiffs—*i.e.*, fewer than the 100-plaintiff threshold required to trigger CAFA jurisdiction. *See id.* Because Janssen had no basis for concluding that the other plaintiffs whose cases were identified in the Petition would acquiesce in the proposal for a joint trial, Janssen had to wait until the 20-day period for responding to the October 11 Petition expired on October 31. When no plaintiff filed an opposition to the proposal to jointly try all plaintiffs' claims, Janssen removed the 106 actions at issue here on November 9 as a mass action under CAFA. *See* Def.'s Not. of Removal ¶¶ 31–32.

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[6] Contrary to their assertion, Plaintiffs did not refile the petition "at the behest of Defense Counsel." Pls.' Mem. at 4. In fact, Plaintiffs' *own* evidence confirms that Plaintiffs refiled the petition at the direction of the state court. *See* Pls.' Mem., Ex. G (Porter Aff.) (stating that "the Court Administrator contacted me and instructed that the original Petition should be withdrawn and refiled under a case specific caption").

Based on the foregoing, Janssen's Notice of Removal unquestionably was timely filed.

IV. CONCLUSION

For the reasons stated, the Court should deny Plaintiffs' motion to remand and should grant Janssen any other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregory T. Sturges, hereby certify that on 22nd day of December 2016, I caused a true and correct copy of the foregoing to be served via the Court's electronic filing system.

/s/ Gregory T. Sturges
Gregory T. Sturges